

BEFORE THE
STATE OF CALIFORNIA
OCCUPATIONAL SAFETY AND HEALTH
APPEALS BOARD

In the Matter of the Appeal of:

MACKENZIE CONCRETE
4659 Gordon Road
Castro Valley, CA 94546

Employer

Docket Nos. 04-R1D4-9022
and 9023

**DENIAL OF PETITION
FOR RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code hereby denies the petition for reconsideration filed in the above entitled matter by Mackenzie Concrete (Employer).

JURISDICTION

Between September 30 and October 3, 2002, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation at a place of employment maintained by Employer at 2915 Garber Street, Berkeley, California (the site).

On October 4, 2002, the Division issued citations to Employer alleging a serious violation of section 1541.1(a)(1) [excavation protection], general violations of section 1509(a) [Injury and Illness Prevention Program]; section 1509(b) [written code of safe practices]; and section 3381(a) [exposure to falling objects] and a regulatory violation of section 341.1(a) [permit for excavation] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.¹ The Division proposed civil penalties totaling \$3,230 for the alleged violations.

After several attempts by the Division to serve the citations by mail, Employer was served by personal service on January 6, 2003. Employer phoned the Board on May 30, 2003, and initiated its appeal. Appeal forms were sent to Employer on June 19, 2003 and the completed forms were received by the Board on July 7, 2003.

¹ Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

The Board determined that Employer initiated its appeal 120 days late and on October 10, 2003, the Board sent a letter to Employer asking for an explanation for the late filing. No response was received from Employer in response to the October 10, 2003 letter. On March 5, 2004, the Board issued an "Order Denying Late Appeal" on the ground that good cause for the late filing of 120 days did not exist.

On March 26, 2004, Employer filed a petition for reconsideration with the Board.

ISSUE

Has Employer established good cause for filing a late appeal?

REASON FOR DENIAL OF PETITION FOR RECONSIDERATION

After not responding to the Board's request for an explanation for filing a late appeal, Employer now seeks reconsideration over a year and a half after the issuance of the citations stating in relevant part that, "I have responded to that citation and have explained that I had nothing to do with the employee that was found on the job. The man was hired by the home owner.... I did not responded [sic] to your first request in a timely fashion because I felt I had already taken care of the problem by calling and writing the first letter. I do not have an office staff to take care of these problems anymore because I have sized down."

Labor Code section 6617 sets forth five grounds upon which a petition for reconsideration may be based:

- (a) That by such order or decision made and filed by the appeals board or hearing officer, the appeals board acted without or in excess of its powers.
- (b) That the order or decision was procured by fraud.
- (c) That the evidence does not justify the findings of fact.
- (d) That the petitioner has discovered new evidence material to him, which he could not, with reasonable diligence, have discovered and produced at the hearing.
- (e) That the findings of fact do not support the order or decision.

Employer's petition does not satisfy any of these grounds. Rather, Employer seeks to have the Board unilaterally decide that Employer's version of the case is legally and factually correct without the benefit of a hearing and without allowing the opposing side to be heard regarding the merits of the citations, including whether they were properly issued against Employer. The Board cannot do this.

The Board is an independent adjudicatory body setup to hear and decide the appropriateness of citations issued by the Division to employers under well-established appeal procedures. Any employer served with a citation may file an appeal with the Board within 15 working days from the receipt of such citation. (Labor Code § 6600) The 15-day period may be extended or a late filing permitted upon a written showing of good cause that contains sufficient facts to show or establish a reasonable basis for the late filing. (§ 359(b))

Once the Division has issued a citation an employer has an obligation to timely pursue its appeal. An employer must pursue its appeal “with the degree of care a reasonably prudent person would undertake in dealing with his or her most important legal affairs.” (*Timothy J. Kock*, Cal/OSHA App. 01-9135, Denial of Petition for Reconsideration (Nov. 20, 2001).) Prompt adjudication of safety and health violations is necessary to ensure that the objectives of the Occupational Safety and Health Act are achieved.

In this case, approximately six months elapsed before Employer actually filed its appeal and Employer has not stated any legal cause or sufficient factual cause why its appeal was filed late. Therefore, Employer's petition is denied.

DECISION

The Board affirms the Order Denying Late Appeal dated March 5, 2004.

MARCY V. SAUNDERS, Member
GERALD PAYTON O'HARA, Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
FILED ON: May 14, 2004